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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 549

WEST PUBLISHING COMPANY
(a corporation),
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

OPINION BELOW.

The official report of the opinion of the Supreme Court of California rendered in this case may be found in 20 Cal. 2d 720.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this court under section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. sec. 344(b)).

STATEMENT OF THE CASE.

The People of the State of California brought an action against the petitioner in the Superior Court of the State of California, in and for the City and County of San Francisco, to enforce liability against petitioner as a collector of use tax for the State of California (R. 67). Cf. *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U.S. 62, upholding the power of California to impose such liability.

Section 24 of the California Use Tax Act (Stats. 1937, p. 1944) provides that "* * * in any action brought under the provisions of this act process may be served according to the provisions of the Code of Civil Procedure and the Civil Code of this State or may be served upon any agent or clerk in this State employed by any retailer in a place of business maintained by such retailer in this State, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office."

Service of process was made upon petitioner by delivering copies of the process personally to three of petitioner's agents in the State of California and by sending copies of the process by registered mail

to petitioner at its home office in St. Paul, Minnesota (R. 74-80, 84, 195).

Petitioner filed a motion to quash the service of summons (R. 80). At the hearing of the motion the superior court received a large amount of evidence, both oral and documentary (R. 67-205). Thereafter the court determined that it had jurisdiction over petitioner and denied the motion to quash (R. 205).

Petitioner next sought a writ of prohibition from the Supreme Court of California (R. 1-12). An alternative writ was granted (R. 209) but later was discharged and a peremptory writ was denied (R. 249). A petition for a rehearing also was denied (R. 249-250).

Various inaccuracies and omissions in petitioner's statement of the evidence concerning its business activities will be pointed out in the subdivision of this brief which immediately follows.

ARGUMENT.

I. THE DECISION BELOW IS CONSISTENT WITH AND SUPPORTED BY THE APPLICABLE DECISIONS OF THIS COURT.

A. The record clearly supports the decision.

The substantial nature of petitioner's California business is reflected by its concession that the annual sales in California for the last several years have averaged about $160,000 per year (R. 203).

The record shows that the agents of petitioner upon whom service of process was made in California have

been employed by petitioner for many years, Case for 25 years (R. 198), Carroll for fourteen years (R. 147) and Wilson for ten years (R. 142). Each has been given a separate district in the State of California (R. 97-98). Each has permanent headquarters in the State of California where he spends at least a part of nearly every day (R. 198, 200, 146, 149) and where he receives mail (including purchase orders) and telephone messages (R. 200, 201) relating to the petitioner's business, and where people come to discuss matters affecting business (R. 202). Their contracts of employment with petitioner require them to devote their entire time to petitioner's business (R. 95, 99, 106).

The record shows that the authority of these representatives goes considerably beyond the mere solicitation of orders and refutes petitioner's contention to the contrary.

Petitioner's agents are authorized and expected to obtain the full purchase price or down payment with each order taken. This may be in cash. They are instructed always to obtain the first payment with an order, if possible (R. 95, 118).

They receive not only the down payments which accompany the orders but also from time to time are required to make collections on delinquent accounts (R. 115). In this latter connection, they are expressly authorized, if unable to obtain immediate payment, to "endeavor to line up the account with advance checks dated at thirty day intervals * * *". (R. 115-116). It seems to follow from this that they can fix the amount

and date of the checks, thereby in effect extending the time for payment of the delinquent accounts.

Petitioner's agents are informed of the "best terms" the company is willing to extend and are told: "* * * We wish you to get more cash and give shorter time as a rule. Always try, in the first instance, for better terms than here indicated, and only get down to this basis as a last resort" (R. 121).

The agents' duties include the obtaining of credit information and sending it to the home office (R. 116).

The agents are expressly authorized to assist lawyers in disposing of second-hand sets of books by putting such lawyers in touch with prospective purchasers, when such lawyers are willing to purchase West Publishing Co. books if they can dispose of their second-hand sets (R. 122).

The agents are required to send to the home office a daily report of activities (R. 113) as well as collection reports (R. 115) so that they constantly are in communication with the home office and there is every reason to expect they would do precisely what page 199 of the record shows Mr. Case did do, namely, notify the home office of the process served on them in California.

Petitioner characterized the agents upon whom service was made as its "Local Representatives" in its advertising in California publications (e. g., R. 182, 186).

The record shows that these agents arranged with certain law firms in Los Angeles and San Francisco for office space in exchange for the use of several thousand volumes of law books owned by petitioner, which have been kept up to date by petitioner, and that in exchange for the use of petitioner's books the law firms have accorded petitioner's agents the use of office space and furnished them telephone and other services (R. 161-172). The record shows that petitioner not only acquiesced in these arrangements (R. 204) but actively advertised these locations in California publications as petitioner's "San Francisco Office" and "Los Angeles Office" (e. g., R. 179) and in its advertising suggested that "full details" could be obtained at these addresses (e. g., R. 178, 179). In addition to advertising the addresses of these locations, petitioner also advertised the telephone numbers (e. g., R. 186). The stipulation of the parties with respect to petitioner's advertising is set forth in the record at pages 173 to 194. This stipulation, including the exhibits incorporated therein by reference, was introduced in evidence at R. 173. As shown by the above mentioned advertising, petitioner obtained the advantage of fixed points of contact with the public in California. Certainly the Supreme Court of California was correct in stating that petitioner enjoys the advantages attendant upon the establishment of a fixed and local habitation for the conduct of its business.

It appears from the petitioner's description of its method of doing business that its sales, at least in

part, are made under title-retaining contracts, the petitioner retaining title to the books until payment has been made in full (R. 124). Thus petitioner ships books into the State, retaining a security interest in them which receives the protection of this State.

Nor has petitioner been content to ship books into California only in response to prior orders. The record shows, for example, that petitioner has shipped books into California without prior order, which have thereafter been disposed of in this State. In the letter set forth at page 197 of the record the Attorney General of California protested to West Publishing Co. against its shipping books without order. The reply of the West Publishing Co. is set forth at pages 195 and 196 of the record and the testimony of William M. Case, agent of the West Publishing Co., at page 201 of the record, completes the picture. Petitioner attempts to pass this off as an isolated transaction. But it appears from the correspondence that it is not alone the Attorney General to whom petitioner has shipped books without prior order. Petitioner's letter (R. 196) says: "* * * we determined to send the new series to *all* owners of the Fourth Series * * *." (Emphasis added.) It further appears that this practice has not been confined to the Fifth Series of Words and Phrases, for the Attorney General protested (R. 197) that "*as we have previously advised you,* we do not want books sent to this office except upon order." (Emphasis added.)

It further appears that if the person to whom the books were shipped registered an objection with peti-

tioner to this method of doing business, it sent one of its local representatives around to endeavor to persuade the recipient of the books to retain them. Mr. Case testified that he made such a call at the Attorney General's office and that the books were retained by the Attorney General (R. 201).

Here is a course of conduct which, we submit, is intrastate in character. The books were shipped into the state without prior order. Any sale of them obviously would have to occur after they were in the state. Apparently petitioner satisfied itself as to the credit rating of the persons to whom it shipped the books and nothing remained to consummate the sales but for such persons to indicate their assent to accept the books so shipped to them.

B. Petitioner misconstrues the comment of the court below concerning a combination of activities.

Petitioner construes the opinion of the Supreme Court of California as holding that a combination of activities, no one of which was sufficient, constitutes doing business to such extent as to make petitioner subject to the process of respondent court. It may well be that a cumulation of activities, no one of which alone would be sufficient, would constitute doing business. For example, one or a few isolated business transactions might not constitute doing business whereas frequent repetition of such transactions might call for a different result. However, the opinion below did not rest on that basis. In the portion of its opinion quoted at page 11 of the petition herein, the Supreme Court of California was merely summariz-

ing some of the previous decisions of this court. Many of the activities here present were not referred to in that summary; for example, such previously described activities as the collection of down payments and delinquent accounts by petitioner's agents in the State of California, the use of petitioner's books to obtain office space and petitioner's shipment of books into California without prior order, to mention only a few of such activities. The court below correctly stated the law when it said that "it is the combination of local activities conducted by such foreign corporation —their manner, extent and character—which becomes determinative of the jurisdictional question".

C. The decision below rests upon decisions of this Court which are applicable and controlling.

The decision of this court in the case of *International Harvester Co. v. Kentucky,* 234 U.S. 579, as stated by the court below, is a leading and oft-cited authority on the subject of service of process upon a foreign corporation. The Supreme Court of California made a thorough analysis of that case and the cases which have followed it. The court was careful to point out that some of the subsequent decisions have regarded the authority of the agents to receive payments in Kentucky as the significant factor in the *International Harvester Co.* case whereas others have regarded the quantity and continuity of the solicitation of business in Kentucky as the controlling feature. But, as the court below stated, whichever view is taken as to the controlling factor in the *International Harvester Co.* case, the facts here firmly sup-

port a holding that petitioner was subject to the service of process. We already have pointed out that not only were petitioner's agents authorized and instructed to receive payments in California in connection with all orders taken by them and to collect delinquent accounts from time to time, and not only was there a continuous course of business in the solicitation of orders in response to which large quantities of books were shipped into California, but also there were many other factors not present in the *International Harvester Co.* case. For example, in that case the company's agents were expressly forbidden to have any headquarters in Kentucky, whereas here petitioner's agents enjoy the use of permanent headquarters in California which petitioner has advertised as places for the public to contact in California concerning petitioner's publications. There is no indication in the *International Harvester Co.* opinion that the company shipped any goods into Kentucky without prior order whereas we have shown that the record in this case discloses such activity on the part of petitioner. These are but illustrative of a number of local activities present here but absent from the *International Harvester Co.* case.

Another decision of this court which supports the decision of the Supreme Court of California herein is that rendered in *Felt & Tarrant Manufacturing Co. v. Gallagher,* 306 U.S. 62. It was there held that the State of California could require a foreign corporation to collect and remit the California use tax, even though it had not qualified to do intrastate business

and, we submit, its business activities in California were considerably less than those of petitioner which we have previously pointed out. For example, in the *Felt & Tarrant Co.* case, the company's agents were expressly forbidden to accept payments and it does not appear that the public had any contact with the offices occupied by the Felt & Tarrant Company's agents or that the company engaged in any advertising (cf. *Nelson v. Montgomery Ward & Co., Inc.*, 312 U.S. 373, at 376 on the effect of advertising). Nor does it appear that the Felt & Tarrant Co. shipped merchandise into California without prior order. If California has the power to require such a corporation to act as collection agent, it certainly seems to follow that such a corporation would be subject to process in California in an action relating to its duty as such collection agent. See *Traynor,* "State Taxation and the Commerce Clause in the Supreme Court, 1938 Term", 28 Calif. L. R. 168, 185-186.

Petitioner asserts that the question of due process of law was not discussed in the opinion of this court in the *Felt & Tarrant Manufacturing Co.* case. The best answer to this is the opinion itself for it states, at page 66, that one of the contentions raised and decided adversely to the appellant is that enforcement of the statute would deprive it of its property without due process of law.

An interesting analysis of the problem of service of process upon a foreign corporation is contained in the opinion written by the late Mr. Justice Cardozo in *Tauza v. Susquehanna Coal Co.*, 115 N.E. (N.Y.) 915.

The case of *People's Tobacco Co. v. American Tobacco Co.,* 246 U.S. 79, cited by petitioner, is readily distinguishable, for in that case the solicitors did not have authority to accept payments but were merely authorized to solicit orders. Moreover, doubt has been cast on the *People's Tobacco Co.* case by the decision of this court in *Felt & Tarrant Manufacturing Co. v. Gallagher,* 306 U.S. 62. See *Traynor,* supra, 28 Calif. L. R. 168, 185-186. In the *Felt & Tarrant Manufacturing Co.* case, the agents were expressly denied authority to collect payments. Yet this court held that the State of California could require the corporation to collect and remit the California use tax.

The case of *Philadelphia R. R. Co. v. McKibbin,* 243 U.S. 264, cited by petitioner, is not comparable to the situation here involved. In that case, no agent of the corporation engaged in any business activity on behalf of the corporation in the state where service of process was attempted.

II. THE DECISION OF THE SUPREME COURT OF CALIFORNIA CASTS NO UNDUE BURDEN UPON INTERSTATE COMMERCE.

In view of the decisions of this Court, petitioner's contention that to subject it to the process of the courts of California would violate Article I, Section 8, Clause 3, of the Constitution of the United States, fails to present a substantial federal question.

The record does not bear out petitioner's assertion at page 17 of its petition that it transacts only inter-

state business in the State of California and there does nothing more than solicit orders for its books. We have referred to portions of the record which show that petitioner's activities have gone considerably beyond the mere solicitation of orders and have even to some extent been intrastate in character.

However, even if petitioner's activities were solely interstate in character, the commerce clause presents no objection to the validity of the service of process here involved. The complete answer to petitioner's contention is found in *International Harvester Co. v. Kentucky,* 234 U.S. 579, 587-589, wherein it is held that a corporation engaged exclusively in interstate commerce may be subjected to state process.

The *International Harvester Co.* case is cited in *Natural Gas Pipeline Co. v. Slattery,* 302 U.S. 300, 306-307, as holding that "* * * a foreign corporation engaged exclusively in interstate commerce within the state is amenable to process there as are citizens and corporations engaged in local business. * * *"

The *Natural Gas Pipeline Co.* case upheld the imposition under state law of a requirement that a foreign corporation engaged exclusively in interstate commerce furnish certain information to a state commerce commission.

In *Felt & Tarrant Manufacturing Co. v. Gallagher,* 306 U.S. 62, this court held that a corporation, regarded as engaged exclusively in interstate commerce, was required to collect use tax for the State of California.

Petitioner attempts to support its contention by citing cases for the proposition that a state may not

impose a tax upon interstate commerce. These cases are inapposite in the first place because they are concerned with problems of taxation rather than of service of process. But even if the merits of petitioner's liability to the State of California were here involved, the cases cited by petitioner would not be controlling since no tax upon the operations of interstate commerce is involved.

Cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582;

Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62;

McGoldrick v. Berwind White Co., 309 U.S. 33, 55-57;

McGoldrick v. Felt & Tarrant Manufacturing Co., 309 U.S. 70;

California v. Thompson, 313 U.S. 109, 112.

CONCLUSION.

We respectfully submit that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
December 30, 1942.

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